COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP936 **Cir. Ct. No. 2007CV255**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

REGINALD CHAMBERLAIN AND MADONNA CHAMBERLAIN,

PLAINTIFFS-APPELLANTS,

LIBERTY MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

FITCHBURG PLUMBING, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Reginald Chamberlain and his wife, Madonna Chamberlain, pro se, appeal an order of the circuit court dismissing on summary

judgment their negligence action against Fitchburg Plumbing, Inc. The circuit court determined that the Chamberlains were precluded by the doctrine of issue preclusion from relitigating issues pertaining to whether Reginald sustained injury from exposure to sewer gas emitted from a sewer pipe the Chamberlains alleged was negligently installed by Fitchburg Plumbing because those issues had been previously litigated and determined in a worker's compensation action brought by Reginald against his employer and its worker's compensation insurer. We affirm.

BACKGROUND

¶2 In 2008, Reginald brought a workers' compensation action against his employer, Holiday Retirement and its insurer. Reginald claimed that on November 3, 2006, he was exposed to sewer gas from a "walled-up duct-taped sewer pipe," which was installed by Fitchburg Plumbing in a storage room of the retirement home where Reginald was employed. Reginald claimed that as a result of this exposure, he was rendered permanently and totally disabled.

¶3 In an eighteen-page written decision, the administrative law judge (ALJ) determined that Reginald had not sustained an injury from exposure to sewer gas and dismissed his action. The ALJ found that the medical evidence did not support a finding that Reginald was exposed to toxic amounts of sewer gas or sustained any injury from that alleged exposure. The ALJ also found that Reginald was not a credible witness with respect to testimony pertaining to his alleged exposure to sewer gas and resulting injuries. Chamberlain petitioned LIRC for review of the ALJ's decision, and LIRC affirmed. LIRC agreed with the ALJ's decision and "adopt[ed] the findings and order in [the ALJ's] decision as its own."

¶4 Reginald filed an appeal of LIRC's decision with the Sauk County Circuit Court. Before a decision was rendered by the circuit court, Reginald, his employer and its insurer entered into a compromise agreement. The compromise agreement provided in relevant part: "Rather than proceed with further judicial appeals, the parties have agreed to resolve their disputes with a full and final compromise settlement agreement. [Reginald] has agreed to accept and [his employer and its insurer] has agreed to pay the sum of $5,000.00 in exchange for a compromise …."[1]

¶5 Following the ALJ's approval of the compromise agreement, Reginald and Madonna filed the present negligence action against Fitchburg Plumbing. The Chamberlains alleged that in November 2006, Reginald was exposed to sewer gas at his place of employment from an uncapped sewer vent pipe which caused him personal injury. The Chamberlains alleged that Fitchburg Plumbing was responsible for installing the plumbing at the facility, including capping the sewer vent pipe, but that it failed to cap the sewer pipe.

---

[1] The parties' original compromise agreement included the following language:

> It is the intention of the parties that, following approval of this compromise agreement by the Department, the Department's prior order of April 17, 2009, together with the Commission's decision of September 30, 2009, will have no legal effect. That is to say, the findings of fact and conclusions of law previously made on this claim by the Department and by the Commission shall be rescinded by the approval of this compromise agreement under the provisions of Section 102.16 of the Worker's Compensation Act.

The ALJ, however, refused to sign the original agreement with this language included. The quoted language was then removed from the compromise agreement, which the ALJ had refused to sign. We merely note here that this bit of history does not affect the outcome of this appeal. We would reach the same result even if the quoted language had been included in the compromise agreement.

¶6 In March 2011, Fitchburg Plumbing moved the circuit court for summary judgment against the Chamberlains based on issue preclusion. Fitchburg Plumbing argued that the issues raised in this action had been previously litigated in Reginald's worker's compensation case and that Reginald was precluded under the doctrine of issue preclusion from relitigating those issues. The circuit court initially denied Fitchburg Plumbing's motion, but later granted the motion on reconsideration. The court found that Reginald is precluded by the doctrine of issue preclusion from relitigating in this present lawsuit the question of whether he was injured by exposure to sewer gas at his place of employment, an issue previously litigated in his worker's compensation claim. Because Madonna's claims were purely derivative, the court found that Madonna is likewise precluded from seeking damages in this action. Reginald and Madonna appeal.

DISCUSSION

¶7 The Chamberlains contend that the circuit court erred in determining that they are barred in the present action by the doctrine of issue preclusion from litigating issues pertaining to whether, in November 2006, Reginald sustained personal injury at his place of employment from exposure to sewer gas which allegedly emanated from an improperly capped sewer pipe installed by Fitchburg Plumbing.

¶8 We review summary judgment de novo. ***Pinter v. American Family Mut. Ins. Co.***, 2000 WI 75, ¶12, 236 Wis. 2d 137, 613 N.W.2d 110. Summary judgment is appropriate when no material factual dispute exists and the moving

party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2011-12).[2]

¶9 Issue preclusion, formerly known as collateral estoppel, prevents the relitigation of issues that have been actually litigated in a prior proceeding. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999). The supreme court has stated that under the doctrine of issue preclusion, "'[o]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'" ***Id.*** (quoted source omitted).

¶10 The Chamberlains argue that issues litigated in a worker's compensation action cannot have preclusive affect in a subsequent action brought by the employee against a third-party tortfeasor. The Chamberlains argue that WIS. STAT. § 102.29(1)(a) creates "two independent actions, between which issue preclusion is inapplicable," and "exempts [w]orker's [c]ompensation claims from having preclusive effect against the employee's claim against a third-party tortfeasor." The Chamberlains rely on the following language from § 102.29(1)(a):

> The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employee *shall not affect the right of the employee,* the employee's personal representative, or other person entitled to bring action, *to make claim or maintain an action in tort against any other party for such injury or death, hereinafter referred to as a 3rd party ….*

[2] All references to the Wisconsin statutes are to the 2011-12 version unless otherwise noted.

Id. (emphasis added). The Chamberlains argue that applying issue preclusion here to bar their suit against Fitchburg Plumbing is inconsistent with an employee's right to bring a claim against a third party, as protected by § 102.29(1). We disagree.

¶11 WISCONSIN STAT. § 102.29(1)(a) provides that an injured employee has the right to make a claim for compensation against his or her employer or worker's compensation carrier, as well as the right to make a claim or maintain an action in tort against a third party for the employee's injury. However, nothing in the plain language of the statute provides that the litigation of an employee's worker's compensation claim can have no effect on the litigation of the employee's tort claim against a third party. Furthermore, contrary to the Chamberlain's assertion, the application of issue preclusion in this situation does not affect an employee's right to bring a separate tort action against a third party. The employee is free to bring a separate action. Whether the employee will be successful in that endeavor and whether issues or claims litigated in a prior proceeding will impact that suit is an issue separate from the employee's ability to bring such an action. That a lawsuit may encounter procedural or substantive problems is not an infringement on the right to bring an action.

¶12 The Chamberlains argue in the alternative that even if an issue litigated in a worker's compensation action can have preclusive effect in a subsequent tort action brought by the employee against a third-party tortfeasor, the circuit court in this case erred in determining that the doctrine barred relitigation of the issue of whether Reginald suffered injury from exposure to sewer gas coming from a negligently installed sewer pipe.

¶13 Whether issue preclusion applies against a party requires a multi-step analysis. First, the court must determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment. ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶37, 300 Wis. 2d 1, 728 N.W.2d 693. This determination presents a question of law, which this court decides de novo. ***Id.*** If, and only if, this first step is satisfied, the court must next determine whether the litigant against whom issue preclusion is asserted was a party to the prior proceeding, or is in privity, or has a sufficient identity of interest with a party to the prior proceeding. ***Paige K.B.***, 226 Wis. 2d at 224. This too presents a question of law, which we review de novo. ***Id.*** If the answer to the second inquiry is yes, the final step is to determine whether the application of issue preclusion comports with fundamental fairness. ***Id.*** at 225. Case law has set forth five non-exclusive, non-dispositive factors to aid a circuit court in determining whether the application of issue preclusion is fundamentally fair. ***Id.*** These factors are:

> (1) could the party against whom [issue] preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Id. at 220-21 (quoting ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993)). The circuit court's ultimate decision on fundamental

fairness is a matter of discretion for the circuit court. ***Paige K.B.***, 226 Wis. 2d at 221. However, some of the factors, including whether the party against whom issue preclusion is sought could have obtained judicial review of the prior judgment, present questions of law. ***Id.*** at 225.

¶14 Turning to the first inquiry, the Chamberlains do not dispute that the issue the circuit court determined was precluded from relitigation in the present action—namely whether Reginald sustained any injury from exposure to sewer gas while at work—was essential to the judgment. They challenge, however, the circuit court's determination that the precluded issue was actually litigated in the worker's compensation proceeding and resulted in a valid judgment. The Chamberlains argue that because Reginald, his employer and its insurer entered into a compromise agreement while Reginald's appeal of LIRC's decision was pending before the circuit court, the issue was not "actually litigated and determined." The Chamberlains take the apparent position that Reginald's settlement with his employer and its insurer vacated LIRC's decision. We disagree.

¶15 We have not been directed to any controlling legal authority in Wisconsin on what effect a compromise agreement has on a lower court decision if the agreement is reached while an appeal of the underlying decision is pending. However, we find persuasive the reasoning of the Seventh Circuit Court of Appeals in ***In re Mem'l Hosp. Inc.***, 862 F.2d 1299 (7th Cir. 1988), which is cited to us by Fitchburg Plumbing.

¶16 In ***In re Mem'l Hosp.***, the Seventh Circuit addressed what affect, if any, a settlement agreement reached on appeal has on the decision and/or judgment underlying the appeal. The Seventh Circuit held that a settlement on

appeal does not require expungement of the lower court's decision, stating: "[A]n opinion is a public act of the government, which may not be expunged by private agreement. History cannot be rewritten. There is no common law writ of erasure." ***Id.*** at 1300. The court explained that in reaching a decision in a case on the merits, a judge may have devoted "many hours," and that the judge's decision "have persuasive force as precedent that may save other judges and litigants time in future cases." ***Id.*** at 1302. The court further explained:

> When a clash between genuine adversaries produces a precedent [] the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement. The precedent, a public act of a public official, is not the parties' property. We would not approve a settlement that required us to publish (or depublish) one of our own opinions, or to strike a portion of its reasoning …. If parties want to avoid stare decisis and preclusive effects, they need only settle before the [lower] court renders a decision, an outcome our approach encourages.

Id. For the reasons articulated by the Seventh Circuit, we decline to hold that a settlement by the parties on appeal vacates the lower court or agency's decision.

¶17 Turning to the final two steps of our inquiry, the Chamberlains do not dispute that Reginald was a party to the prior proceeding. They argue, however, that the circuit court erroneously exercised its discretion in determining that the application of the issue preclusion in this case is fundamentally fair. Of the five factors identified by the supreme court in ***Michelle T.***, 173 Wis. 2d at 688-89, the Chamberlains limit their argument to only the third factor—whether significant differences in the quality or extensiveness of proceedings between the

two courts warrant relitigation of the case.[3] ***Id.*** The Chamberlains assert that issue preclusion should not be applied against them in this case "because the procedures used in the worker's compensation proceeding differ substantially from the procedures that would have been available in the circuit court." However, they do not explain how or why. Conclusory assertions and undeveloped arguments need not be decided on appeal. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56.

¶18 The Chamberlains also argue that the application of issue preclusion in this case is unfair because issues precluded were decided by an administrative agency and they did not have the opportunity to have those issues decided by a jury of their peers. We have not been able to find where this argument was raised below and the Chamberlains have not directed us to a location in the record where this argument was raised. It is a well-established rule that we need not consider arguments raised for the first time on appeal. ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661.

CONCLUSION

¶19 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

[3] The Chamberlains do not respond to Fitchburg Plumbing's argument in its response brief that factors one, two, four and five support the circuit court's finding that application of issue preclusion in this case is fundamentally fair. A proposition asserted by a respondent on appeal and not disputed by the appellants' reply is taken as admitted. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

Not recommended for publication in the official reports.